Supreme Court, U.S.
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No. 88-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GERARD W. MCCALL,

Petitioner,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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July 29, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a railroad locomotive engineer who was medically disqualified from work and processed his claim that he is physically able to safely perform his job under the exclusive procedures mandated by the Railway Labor Act, 45 U.S.C. § 153, and having said claim adjudicated against him by a three-doctor panel convened to consider his claim, may nevertheless recover a verdict for damages predicated upon precisely the same claim under a state handicap law, which claim of necessity involves the interpretation of the express and implied terms and conditions of his railroad collective bargaining agreement which encompass the physical requirements and medical qualifications involved in the scope and details of his railroad work.

PARTIES TO THE PROCEEDINGS

Petitioner Gerard W. McCall was the appellee in the proceeding before the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed.

Respondent Chesapeake & Ohio Railway Company (hereinafter "C&O") was the appellant in the proceeding below. On August 31, 1987, C&O was merged into CSX Transportation, Inc. (hereinafter "CSXT"). CSXT is a wholly-owned subsidiary of CSX Corporation (hereinafter "CSX"). The subsidiaries and affiliates of CSX and CSXT, other than those wholly owned by them, are as follows:

1. CSX Realty, Inc., a wholly owned subsidiary of CSX, has a partial interest in Mid-Allegheny Corporation.

2. CSXT has a partial interest in the following:
   a. Allegheny and Western Railway Company;
   b. The Baltimore and Philadelphia Railroad Company;
   c. Clearfield and Mahoning Railway Company;
   d. Dayton and Michigan Railroad Company;
   e. Dayton and Union Railroad Company;
   f. The Home Avenue Railroad Company;
   g. The Cleveland Terminal & Valley Railroad Company;
   h. Augusta and Summerville Railroad Company;
   i. Beaver Street Tower Company;
   j. Central Transfer Railway and Storage Company;
   k. Chatham Terminal Company;
   l. North Charleston Terminal Company;
   m. Paducah & Illinois Railroad Company;
   n. Winston-Salem Southbound Railway Company;
   o. Woodstock & Blockton Railway Company.

3. Western Maryland Railway Company, a wholly owned subsidiary of CSXT, has a partial interest in

the Baltimore and Cumberland Valley Railroad Extension Company.

4. CSXT has a partial interest in Richmond Washington Company, which in turn has a partial interest in the Richmond, Fredericksburg and Potomac Railroad Company.

As a matter of convenience, the Respondent will be referred to as the C&O throughout the brief.

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OPINIONS BELOW

The decisions below of the United States District Court for the Eastern District of Michigan, Southern Division, and of the United States Court of Appeals for the Sixth Circuit are contained in the Appendix to the Petition. Subsequent to the filing of the Petition herein, the Sixth Circuit issued its order denying petitioner's "Motion for Late Reconsideration" on July 11, 1988, which is contained in the Supplemental Appendix attached hereto. (Opp. App., *infra*, 1a.)

STATUTE INVOLVED

The Railway Labor Act (hereinafter "RLA"), 45 U.S.C. § 151, *et seq.*, the pertinent parts of which are set forth in the Appendix hereto. (Opp. App., *infra*, 3a-5a.)

STATEMENT OF THE CASE

On June 15, 1983, petitioner McCall was removed from his position as a locomotive engineer by the Medical Officer of his employer, the C&O, because of an uncontrolled diabetic condition which did not allow him to safely perform his job. His own treating physician disagreed, being of the opinion that Mr. McCall was physically and mentally able to perform the regular duties of his position.

On September 1, 1983, the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, on behalf of Mr. McCall, requested that a three-doctor panel be convened under Addendum No. 27 to the collective bargaining agreement (Opp. App., *infra*, 6a-7a), as provided for in 45 U.S.C. § 153 Second. Thereafter, the two doctors agreed upon a third physician meeting the criteria specified in Addendum No. 27, who was furnished with a fifty-nine (59) page analysis of the job requirements of a railroad locomotive engineer, together with the medical requirements of the job. After obtaining a detailed history from Mr. McCall and performing a medical examination upon him, the third physician submitted a report which agreed that Mr. McCall should not be permitted to be an engineer/fireman while taking insulin which did not control his diabetes, and the Brotherhood was duly notified of the majority decision against Mr. McCall. (Opp. App., *infra*, 10a-11a.) Con-

trary to the assertions in the Petition, Mr. McCall's disqualification was not pursuant to any blanket policy of the railroad disqualifying all diabetics, or even those who required insulin. Rather, it was a medical finding, predicated upon the scope and physical requirements of his job as established under the applicable collective bargaining agreements, together with Mr. McCall's medical history and physical examinations, that he was not physically qualified to safely perform his railroad work, which caused his disqualification.

Thereafter, petitioner made no further submissions or appeals under the RLA, either to the Board or to the federal district court as required under the Act.

Instead, petitioner filed a claim for damages under the Michigan Handicapper's Civil Rights Act, Mich. Comp. Laws § 37.1101, *et seq.* (1985), alleging that his disability was unrelated to his ability to perform his railroad job. The case, filed in the United States District Court for the Eastern District of Michigan, Southern Division, resulted in a jury verdict in favor of Mr. McCall in the amount of $328,000.00.

The C&O appealed to the United States Court of Appeals for the Sixth Circuit, which reversed, holding that Mr. McCall's claim under the state handicap statute was preempted by the provisions of the RLA.[1] Subsequent thereto, and pursuant to this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, ___ U.S. ___ , 108 S.Ct. 1877 (1988), petitioner moved for rehearing, which motion was denied on July 11,

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[1] Because its preemption holding was dispositive of the case, the Sixth Circuit did not rule on the other grounds asserted in the C&O's appeal.

1988 (Opp. App., *infra*, 1a), subsequent to the filing of the Petition herein.

SUMMARY OF ARGUMENT

The Petition herein is premised upon the claim that the Sixth Circuit's decision below is contrary to established precedent of this Court which allows independent state statutory rights to be vindicated in the courts, despite the availability of arbitration procedures pursuant to collective bargaining agreements. (Petition, at p.5.) Indeed, as framed in the Petition's "Question Presented", petitioner asserts that his claim does not involve the interpretation of his railroad collective bargaining agreement. From that point, the Petition seeks to avail itself of this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, *supra*, and other decisions involving § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

As will be demonstrated below, the assertions in the Petition are entirely misplaced and overlook the applicable body of settled law contained in the decisions of this Court pertaining to so-called "minor disputes" under Section Three of the RLA. Those decisions clearly establish that a dispute arising out of a railroad worker's claim that he is physically capable of performing his duties is a "minor dispute" under that Act and that the decision of a three-doctor panel convened under 45 U.S.C. § 153 Second is final and binding upon the parties, absent the limited statutory review provided for in 45 U.S.C. § 153 First (q). Those decisions also provide that neither party may collaterally attack the panel's decision, as was

done by Petitioner in his subsequent claim below for damages under Michigan's handicap discrimination law.

Moreover, the Petition's reliance on *Lingle, supra*, and related cases predicated upon the Labor Management Relations Act is misplaced, as this Court has carefully distinguished between the arbitration thereunder which is agreed to by the parties, and the arbitration which is mandatory and binding upon the parties under the RLA.

ARGUMENT

The Petition herein is curiously silent as to the many pronouncements by this Court holding that so-called "minor disputes" under the RLA are subject to resolution under the mandatory and exclusive procedures established by that Act. As will be developed below, petitioner's claim that he is physically qualified to perform his railroad work is such a "minor dispute", and the resolution of his claim under the RLA, as here, precludes his attempt to relitigate such claim under the guise of state law. The Act provides the sole means by which an aggrieved party may obtain judicial review of his claim, so as to preempt any collateral attack under state law.

I

QUESTIONS OF PHYSICAL ABILITY TO PERFORM RAILROAD WORK ARE "MINOR DISPUTES" SUBJECT TO THE MANDATORY AND EXCLUSIVE PROCEDURES MANDATED BY THE RLA

Although the railroads maintained for many years that the setting of physical standards for the various categories of railroad workers (as well as the related question as to whether an employee was medically

qualified thereunder) was purely a prerogative of management, this Court's decision in *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257 (1965), held the same to constitute a "minor dispute" subject to the exclusive arbitration procedures mandated under Section Three of the RLA.[2]

In *Gunther*, as here, a three-doctor panel was convened to evaluate a locomotive engineer's grievance that he was physically qualified to safely perform the requirements of his job, and rendered its judgment by a divided vote. This Court not only held that an employee's claim of physical qualification was a "minor dispute" under the Act, but also spoke to the wisdom of creating three-doctor panels to adjudicate the claim:

> In § 3 Congress has established an expert body to settle "minor" grievances like petitioner's which arise from day to day in the railroad industry.
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> * * * * * * * * *
>
> As hereafter pointed out Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate

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[2] Under the "major/minor" dispute dichotomy which has arisen under RLA, the so-called "minor disputes" are "all disputes" growing out of either "grievances" or the "interpretation or application of agreements covering rates of pay, rules or working conditions," 45 U.S.C. § 151a; thus the plain language of the Act encompasses not only claims based upon an express term of the collective bargaining agreement, but also those "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement. . . ." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945).

> grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field.
>
> The courts below were also of the opinion that the Board went beyond its jurisdiction in appointing a medical board of three physicians to decide for it the question of fact relating to petitioner's physical qualifications to act as an engineer. We do not agree. The Adjustment Board, of course, is not limited to common-law rules of evidence in obtaining information.
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> * * * * * * * * *
>
> On a question like the one before us here, involving the health of petitioner, and his physical ability to operate an engine, arbitrators would probably find it difficult to find a better method for arriving at the truth than by the use of doctors selected as these doctors were.

382 U.S. at 261-62.[3] The *Gunther* decision then proceeded to discuss this Court's prior holdings as to the "mandatory", "exclusive" and "complete and final

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[3] In *Gunther*, the Court noted that the current agreement contained a provision for the appointment of a three-doctor panel to adjudicate such questions (386 U.S. at 262). In the case at bar, Addendum No. 27 of the C&O Agreement covering petitioner contains a similar provision. (Opp. App., *infra*, 8a-9a.)

means for settling minor disputes" under the RLA, and went on to hold:

> The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court.

382 U.S. at 264. While the Petition asserts that Mr. McCall's claims ". . . do not involve interpretation of the collective bargaining agreement" (*See*, Petition, "Question Presented"), it is mistaken, for his claim is inextricably interwoven in the fabric of the express and implied agreements embodied therein.

One need only look to Addendum No. 27 to demonstrate these express and implied agreements, as well as the custom and practice of the industry, which are involved in such a claim. Of course, Addendum No. 27 itself is the express agreement which establishes the procedure for selection of the three-doctor panel, as well as the specific qualifications required of the so-called "neutral doctor".[4] It specifies that the medical board shall determine ". . . the physical fitness of the engineer to continue in service of the

[4] The agreement specifies that he shall be (1) a practitioner, (2) of recognized standing in the medical profession, and (3) a specialist in the disease allegedly suffered by the engineer. (Opp. App., *infra*, 8a, ¶ 5.)

carrier . . .", and that the findings of the majority of the board ". . . shall be final and binding upon the carrier, the engineer and the Brotherhood . . .", yet provides for the future circumstances where there may be a change in the engineer's physical condition. (Opp. App., *infra*, 8a ¶ 4.)

Subsumed within these express provisions are implied agreements, such as the "triggering" device for Addendum No. 27—a finding of physical disqualification by the carrier's Chief Medical Examiner—which provision recognizes the carrier's custom and practice that the carrier initially sets the physical qualifications and then conducts physical examinations to assure that the employee is fit to safely perform his job. Also subsumed within the agreement are the terms and conditions of the employee's job, *i.e.*, what his job consists of and the necessary physical/medical qualifications therefor.[5] Even the physical requirements of the job are not static, as they in turn depend upon the work of a given craft, which may change from time to time as collective bargaining agreements are amended, due either to changing technology or to changes in the carrier's agreements with yet other Brotherhoods.[6]

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[5] In this case, the Medical Panel was supplied with a "Job Analysis Summary" authored by a consultant, which was developed jointly by nine railroads and approved by the Steering Committee of the Railroad Personnel Association. The Summary is 59 pages in length, and encompasses the specifics of locomotive work, the physical requirements utilized in connection therewith, and the medical standards therefor.

[6] The job requirements of locomotive work have undergone substantial change over the years, earlier with the advent of the diesel locomotive which largely eliminated the requirement of a

It is clear beyond peradventure that a claim involving the physical qualification of a railroad employee for his job involves the interpretation and application of the express and implied conditions of his collective bargaining agreement, and is thus a "minor dispute". As such, it is subject to the mandatory, exclusive and final adjudication procedures required by the RLA.

II

THE COURT BELOW WAS CORRECT IN HOLDING PETITIONER'S STATE CLAIM PREEMPTED BY THE RLA

The decision of the court below holding petitioner's claim under the Michigan statute preempted by the RLA was correct. It is in accord with the two cases decided by this Court since *Gunther*, *supra*, wherein railroad workers sought to bypass the RLA's mandatory and exclusive procedures in cases involving "minor disputes" by resorting to state remedies.

In *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), the plaintiff attempted to return to work following an automobile accident, but was found to be physically disqualified by the carrier. Based upon his assertion that he was fully recovered and physically able to resume his work on the railroad, he sued under Georgia law for "wrongful discharge". This Court discussed the fact that Andrews' claim of entitlement to return to duty was of necessity predicated upon the collective bargaining agreement, and was therefore subject to the RLA's requirement that it be submitted to the Board for adjustment. In af-

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fireman and, more recently, with the discontinuation of the "caboose", the latter change increasing the monitoring of a train which must be done from the locomotive.

firming the judgment dismissing the employee's complaint, this Court said:

> It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. [Citation omitted.] He is limited to the judicial review of the Board's proceedings that the Act itself provides. [Citation omitted.] In such a case the proceedings afforded by 45 U.S.C. § 153 First (i), will be the only remedy available to the aggrieved party.

406 U.S. at 325.[7]

The Petition places great reliance upon the Court's recent decision in *Lingle v. Norge Division of Magic Chef, Inc., supra*, (together with related cases decided under the Labor Management Relations Act of 1947), for the proposition that state remedies are not preempted by the RLA's system for adjudicating "minor disputes".[8] Such reliance, however, is totally mis-

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[7] As noted in the Petition herein, Mr. McCall admits that the three-doctor panel ". . . was provided under the minor dispute resolution provisions of the Railway Labor Act" which ruled 2-1 that "Petitioner was disqualified from continuing work. . . ." (Petition, at p.4.)

[8] *Lingle* involved a claim under state law for "retaliatory discharge" for filing a claim under the state's workmens' compensation law. This Court, after analyzing the elements of recovery,

placed by reason of a fundamental difference between the two Acts—under the LMRA arbitration is pursuant to the agreement of the parties, whereas under the RLA, the remedy is statutorily compelled.[9] Moreover, there is nothing in the LMRA which approaches the conclusive nature of the RLA's provision for the final and binding nature of the administrative decision: "Such awards shall be final and binding upon both parties to the dispute. . . ." 45 U.S.C. § 153 Second.[10] Significantly, this Court commented upon these differences and their legal effect in *Andrews*, *supra*:

> Indeed, since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is

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and determining that the only issues were ". . . the conduct of the employee and the conduct and motivation of the employer . . .", neither of which required resort to the collective bargaining agreement, held the claim not preempted under the analysis in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

[9] In *Andrews*, *supra*, this Court made it clear that ". . . the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." 406 U.S. at 322.

[10] Quite apart from preemption considerations, this statutory provision provides a basis for total issue preclusion as to matters contested, such as those here. As held in *Gunther*, "a party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding." 406 U.S. at 235.

> if anything stronger in cases arising under [the Railway Labor Act] than it is in cases arising under § 301 of the LMRA.

406 U.S. at 323.

Another principle totally distinguishes the Labor Management Relations Act cases from those under the RLA for preemption purposes. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. ___, 107 S.Ct. 2211 (1987), this Court emphasized that preemption should not be lightly inferred under the LMRA, since the establishment of labor standards falls within the traditional police power of the states. The situation as to railroads operating in interstate commerce, however, is quite the opposite. The Congress has created federal legislation covering virtually every aspect of labor standards for the rail industry far beyond the RLA. For instance, railroad workers injured on the job are not subject to workers' compensation laws but to the remedy provided under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* Their claims for disability, unemployment and retirement are subject not to state law but to the Railroad Retirement Act (45 U.S.C. § 231, *et seq.*) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351, *et seq.*). Even the number of hours railroad employees are allowed to work are specified in the Hours of Service Act (45 U.S.C. § 61, *et seq.*), which this Court held preempted any state regulations on the subject. *See, e.g., Erie R. Co. v. New York*, 233 U.S. 671 (1914).[11]

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[11] In addition, the Rail Safety Act (45 U.S.C. § 421, *et seq.*) and the regulations thereunder relate to virtually all aspects of railroad working conditions. The provisions of that Act provide an interesting contrast to the *Lingle* rationale, inasmuch as that

Moreover, the employee herein, having initiated his RLA remedy by requesting the three-doctor panel under the collective bargaining agreement, and having been aggrieved by the decision of the panel, totally failed to avail himself of the court review provided for in the statute.[12] In *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89 (1978), this Court spoke to the necessity of adhering to the compulsory procedures of the RLA and the importance of the finality of decisions thereunder:

> In enacting [the Railway Labor Act], Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective bargaining agreements. [Citations omitted.]
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> * * * * * * * * *
>
> Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts. [Citation omitted.] The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.

Act prohibits "retaliatory discharge", but specifies that such claim is subject to the "minor dispute" resolution procedures of the RLA. 45 U.S.C. §§ 441(a), 441(c)(1).

[12] 45 U.S.C. § 153 Second provides that the findings of the panel shall be final and binding upon both parties, and enforceable in the same manner as decisions of the Adjustment Board. 45 U.S.C. § 153 First(q) provides for review of Board decisions in the federal courts on limited grounds.

> Normally finality will work to the benefit of the worker: He will receive a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad. [Citation omitted.] Here, the principle of finality happens to cut the other way. But evenhanded application of this principle is surely what the Act requires.

439 U.S. at 94. Here, Mr. McCall, dissatisfied with the result of his RLA remedy, failed to seek any court review under the RLA—instead, he sought to recover under Michigan's law applicable to handicapped persons. And, as noted by the court below, his allegations were precisely the same as those involved in his RLA claim—that notwithstanding his medical condition, he was physically capable of performing his railroad job, the terms and conditions of his work being embodied within his collective bargaining agreement.

In reversing the verdict against the railroad on the grounds of the preemptive effect of the RLA, the court below was in full accord with this Court's decisions in *Gunther*, *Andrews* and *Sheehan*. Any other result would frustrate the very intent of the RLA in providing for expert and final adjudication of "minor disputes" under the compulsory statutory framework.[13] Instead of promoting the Congressional intent

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[13] The $328,000 verdict in petitioner's favor, if allowed to stand, demonstrates the vast differences and inconsistencies in the handling of his claim under the Michigan statute, as contrasted with his rights under the collective bargaining agreement. Although he would pocket the $328,000 district court verdict representing

of providing stability in railroad labor matters by a uniform system of handling such claims, it would subject the same to varying notions as to what constitutes a "handicap" as adopted by the several states in their particular statutes, so that a jury can produce an entirely different result (such as that obtained in the trial court below) on the identical issue adjudicated pursuant to the exclusive statutory remedy prescribed by the Congress.

It is submitted that the decision below was entirely in accord with this Court's pronouncements vitiating state remedies for claims which constitute "minor disputes" under the RLA by reason of that Act's mandatory, exclusive and final means of settling such disputes which arise in the railroad industry. Accordingly, the Petition presents no special or important reasons for this Court to invoke its discretionary *certiorari* jurisdiction to review the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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his railroad wages in the future, he nevertheless still has the right under his agreement to re-qualify for his railroad job at any time when his diabetes comes under control. In this regard, Addendum No. 27, in speaking to the "final and binding" character of the decision of the medical panel, specifically provides that ". . . this does not mean that a change in physical condition will preclude a re-examination at a later time." (Opp. App., *infra*, 8a, ¶ 4.)

Respectfully submitted,

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July 29, 1988

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1462

GERARD W. MCCALL,	)	
	)	
Plaintiff-Appellee,	)	
	)	ORDER DENYING
	)	MOTION FOR
v.	)	"LATE
	)	RECONSIDERATION"
CHESAPEAKE & OHIO RAILWAY COMPANY, a Virginia corporation qualified in Michigan,	)	
	)	
Defendant-Appellant.	)	

Before: MERRITT, MARTIN and WELLFORD, Circuit Judges.

The Court declines to order rehearing or reconsideration in this case based upon plaintiff-appellee's submission of *Linge*[sic] *v. Norge Division of Magic Chef, Inc.*, a case decided June 6, 1988, by the Supreme Court, No. 87-259. The Court has reviewed the slip opinion submitted and concludes that the *Linge*[sic] case does not dictate a contrary result. In the instant case the state handicap action can only succeed under the Supremacy Clause of the Constitution if the collective bargaining agreement adopted under the Railway Labor Act is interpreted to mean that the employee's handicap is unrelated to job performance. If the handicap is job related, management has authority under the collective bargaining agreement to terminate. Thus, the state law handicap action necessarily requires an interpretation of the collective bargaining agreement concerning the job relatedness of the employee's handicap. *Linge*[sic] holds that in such cases requiring contract interpretation the state law action must be preempted.

Accordingly, rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

LAWRENCE GREEN
Clerk

STATUTORY PROVISIONS

The Railway Labor Act

45 U.S.C. § 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act [enacted June 21, 1934], and it is hereby provided—

* * * * * * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * * * * * *

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms

of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code [28 USCS §§ 1254, 1291].

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

* * * * * * * * *

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board,

neutral member, compensation, quorum, finality and enforcement of awards. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

* * * * * * * * *

Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

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A.W. Gall, General Chairman
Telephone (616) 784-2620
C.L. McAnalley, Vice General Chairman
W.E. Corne, Secretary-Treasurer

[Chessie System Labor
Relations Department
Baltimore, MD
Sep 07 1983]

September 1, 1983

Mr. D.T. Kelly
Director Labor Relations
Chessie System
100 North Charles Street
Baltimore, MD 21201

RE: Engineer G.W. McCall-
Employee No. 2406759

Dear Sir:

This refers to my letter of July 26, 1983, and to your response of August 29, 1983.

Engineer G.W. McCall was disqualified to work as an engineer by letter dated June 15, 1983. I wrote to you on July 26, 1983; furnishing copy of letter of Dr. W.L. Hailer, Engineer McCall's family physician, which deemed Engineer McCall fit for duty, and asking that you restore Engineer McCall to duty as an engineer.

I refer you to Paragraph (1) of Addendum No. 27, of the Pere Marquette District Engineer's Agreement, and especially to that part which reads;

> "If appeal is presented with this time limit, arrangements will be made for the engineer to be examined by a special medical board compromised of one selection by the General Chairman, the Chief Medical Examiner of the Carrier, and the two thus selected will select a third member to agreed upon by them."

Your letter of August 29, 1983 only reiterated the position of the Carrier's Medical Department.

I would request that you make arrangements to have Engineer G.W. McCall examined in accordance with the provisions of Addendum No. 27. My selection for this special medical board is:

Dr. W.L. Hailer, D.O.
Trenton Clinic, P.C.
3231 West Road
Trenton, Michigan 48183
Telephone: 1-313-676-7500

Very truly yours,

Arlow W. Gall
General Chairman

[DEFENDANT'S EXHIBIT
8
3-13-86 pjc]

ADDENDUM NO. 27

AGREEMENT BETWEEN THE CHESAPEAKE AND OHIO RAILWAY COMPANY (PERE MARQUETTE DISTRICT) AND ITS EMPLOYEES REPRESENTED BY THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS

(1) When a locomotive engineer is found to be physically disqualified by the Carrier's Chief Medical Examiner, and the Brotherhood of Locomotive Engineers is of the opinion that such engineer's condition does not justify removal from the service, or restriction of his rights to service, appeal must be made in writing to the Assistant Vice President Labor Relations by the General Chairman of the Brotherhood of Locomotive Engineers within sixty calendar days of the date the engineer is notified of his disqualification or restriction. If appeal is presented within this time limit, arrangements will be made for the engineer to be examined by a special medical board comprised of one physician selected by the General Chairman, the Chief Medical Examiner of the Carrier, and the two thus selected will select a third member to be agreed upon by them.

(2) The Engineer shall submit himself to this board for physical examination.

(3) The medical board so appointed will render a joint report of their findings and decision within fifteen days after examination of the engineer. One copy of the report will be transmitted to the Assistant Vice President Labor Relations, one copy to the General Chairman and one copy to the engineer.

(4) The findings and decision of the majority of this medical board as to the physical fitness of the engineer to continue in service of the carrier shall be final and binding upon the carrier, the engineer and the Brotherhood of Locomotive Engineers, but this does not mean that a change in physical condition will preclude a re-examination at a later time.

(5) The third physician selected as outlined above shall be a practitioner of recognized standing in the medical profession and a specialist in the disease or diseases from which the engineer is alleged to be suffering.

(6) Where a claim is made for reimbursement of engineer for time lost, the special medical board will, in cases where the contention of the engineer is sustained, indicate date as of which in its opinion the engineer has recovered sufficiently to resume work in his regular occupation and the engineer will be paid for time lost from that date.

(7) The carrier and the Brotherhood of Locomotive Engineers will each pay the fee and personal expenses of their respective representatives on the medical board, and will each pay one-half of the fee and personal expenses of the third member as well as one-half of all additional expense incurred by the board in connection with the examination.

Signed at Detroit, Michigan, this 24th day of March, 1965.

Accepted for the Brotherhood of Locomotive Engineers:

(Sgd.) G.E. CARPENTER
General Chairman

Accepted for The Chesapeake and Ohio Railway Company:

(Sgd.) G.M. SEATON, JR.
Asst. Vice President-Labor Relations

Approved:

(Sgd.) B.C. CORNELL
Assistant Grand Chief Engineer

ACL/ber

[DEFENDANT'S EXHIBIT
7
3-13-86 pjc]

February 3, 1984
File: 5-169-2-McCall

Mr. A.W. Gall, General Chairman
Brotherhood of Locomotive Engineers
4005 West River Drive, N.E., Box 278
Comstock Park, Michigan 49321

Dear Sir:

Reference is made to previous correspondence concerning Engineer G.W. McCall who was removed from service by the Carrier's Medical Department due to his physical condition.

As requested, a medical panel was established under the conditions set forth in Addendum 27 of the Engineers' Agreement, consisting of Dr. J.A. Thomasino, Chief Medical Officer of the Carrier, Dr. W.I. Hailer, the employee's representative, and Dr. D.C. Leach.

Dr. Leach, having examined Mr. McCall, has concluded that Mr. McCall should not be permitted to be an Engineer/Fireman while taking insulin. Dr. Leach's conclusions, therefore, are in agreement with those of Dr. Thomasino. Enclosed are two copies of Dr. Leach's report, one for your file and the other to be furnished to Mr. McCall. Dr. Leach has furnished a copy of his report to Dr. Hailer.

As the findings and decision of the majority of the Medical Board is that Mr. McCall is not physically qualified to continue in the service of the Carrier as Engineer/Fireman, the purpose of the Three Doctor Panel has been

satisfied and the procedures outlined in Addendum 27 of the Engineers' Agreement concluded.

Very truly yours,

D.T. Kelly
Director Labor Relations

Attachments - 2

bc: Mr. W.B. Vander Veer - Southfield)
Mr. G.S. Athanas - Rougemere)

G.W. McCall should not be permitted to return to service and should continue to be shown as physically unqualified.

J.A. Thomasino, M.D.
Mr. J.D. Crimmins—Copy of Dr. Leach's report is